

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

**Supreme Court
No. 154128**

JUSTLY JOHNSON,

Defendant-Appellant.

**Court of Appeals No. 311625
Former Supreme Court No. 147410
Lower Court No. 99-005393-01-FC**

**The People's Brief in Opposition to
Defendant Justly Johnson Application for Leave to Appeal
with Appendix A**

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Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

Counterstatement of Questions Involved

- I. Did the trial court abuse its discretion in denying Johnson's motion for new trial based on newly discovered evidence due to its finding that the testimony of the victim's son was neither credible nor veracious?

The People answer no.

Johnson answers yes.

The trial court would answer no.

- II. When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. According to the Supreme Court's Remand Order, the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Justly Johnson or Kendrick Scott, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial; the trial court was not directed by the Remand Order to give an opinion about the type of murder involved or the motive for the murder. But the trial court also did do what it was directed by the Supreme Court's Remand Order to do, that is, to again, determine whether the testimony of Charmous Skinner either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial, and the trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Johnson nor Scott. Is reversal of the trial court's Order denying Johnson's Motion for Relief from Judgment warranted?

The People answer no.

Johnson answers yes.

The trial court did not address this question.

- III. Should Defendant's claims of ineffective assistance of trial and appellate counsel pertaining to the victim's son fail?

The People answer yes.

Johnson would answer no.

The trial court answered yes.

- IV. There is no free standing claim of innocence in Michigan jurisprudence, nor should there be; in any event, has Johnson shown entitlement to relief under the stringent burden of proof that other states which had recognized such a claim have applied?

The People answer no.

Johnson answers yes.

The trial court did not address this question.

The People's Rendition of the Facts

Defendant, Justly Johnson, hereafter referred to simply as Johnson, was convicted, following a bench trial before the Honorable Prentis Edwards, of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 70.89, and felony firearm, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction, to 20 to 30 years imprisonment for the assault with intent to rob while armed conviction, and a consecutive two years for the felony firearm conviction.

Bench Trial

Evidence

Included among the evidence presented at trial were the following testimony and stipulations.

Prosecution

William Kindred

William Kindred testified that Lisa Kindred, the deceased victim, had been his wife (Waiver Trial Transcript, 01/10/00, 12). They had three children, who in May of 1999, were ages 8, 2, and newborn (13).

On the evening of May 8, 1999, he, his wife, and their three children went to a drive-in theatre (13). After that, they stopped by his mother's and sister's house on Bewick (13-14). They were all in their new Plymouth Voyager minivan (13). While he went up to the house, his wife and kids stayed in the van (14). He went to his sister's to talk to his brother-in-law, Verlin Miller, about purchasing a motorcycle (15). This was sometime after midnight (15). Twenty minutes after they got to his sister's, his wife came up to the house to get him (15). They did not leave right then,

however (15). His wife went back to the van and he stayed in the house talking to Miller (15). As he was finally getting ready to leave, he heard what sounded like a car door closing (15). He thought that Lisa was coming back into the house to get him to come out (15). When he and Miller went to the door, he saw their van taking off (15-16). The van's tires were squealing and it was speeding, which made him think that something was wrong (16). At the time that he saw the van taking off, he also saw a person running through the field that was across the street from his sister's house (16). He tried to go after this person, but by the time he got out there, the person was gone (16). When he came back to where the van had been parked, he saw broken automobile glass; the glass was still warm (16). The van had gone in the direction of Warren (16-17). He could not see it at that point (17). He just started yelling, and a neighbor from across the street came out, and he told her to call the police (17). She did, and he talked to the police as well (17). He then went into his sister's house, where his sister told him that there was a gas station in the area (17). He borrowed his mother's car and went up to the gas station that his sister had told him about (17). That was where he saw their van (18). Both doors of the van were open and he also saw EMS there (18). Then, he saw his wife (18). EMS had her on a stretcher (18). They were putting his wife in the back of the EMS vehicle (18). He tried to get to her, but they would not let him (18). When EMS took his wife away, he tried to get his kids out of the van (18). Initially, the police, who were also on the scene, would not let him do that, but then they did (18). He noticed that the driver's side window of the van was missing (18).

He then went to the hospital where his wife had been taken, but he never saw her alive again (20). At the hospital, he was notified that his wife had died (21). Later, he got his wife's purse back from a detective (21).

On cross-examination, Mr. Kindred testified that his wife had driven the van over to his mother's and sister's (22). His wife parked the van across the street from his mother's and sister's house (22).

Stipulation (Medical Examiner's Purported Testimony)

The parties stipulated to the admission of the protocol of Chief Wayne County Medical Examiner Sawait Kanlue, which was read into the record, and which stated, in pertinent part, that the 35-year-old female victim sustained a single gunshot wound to the left breast, with no evidence of close-range firing, and that several small irregular superficial wounds present on the left breast and chest were consistent with the decedent being shot through an intermediate target (Waiver Trial Transcript, 01/10/00, 32-33).

Verlin Miller

Verlin Miller testified that he was the brother-in-law of William Kindred (Waiver Trial Transcript, 01/10/00, 34). He was married to Will's sister (34).

Will and his wife Lisa stopped by their house in the late evening/early morning hours of May 8/9 (34). Will had dropped by to discuss the purchase of his (Miller's) motorcycle (35). As he was escorting Will to the door, he heard a loud pop (35). He looked outside and saw Lisa driving off, and he also saw a person running through the field across from his home (35). What he noticed about Lisa's driving was that she was burning rubber and driving real fast (36). He had never seen her drive like that before (36). When he saw that, he turned around and grabbed his jacket and truck keys and jumped in his truck and took off (36). He went looking for the minivan (36). Meanwhile Will had gone running after the person who was running through the field (36). He did not get a good look at this person (36). He came upon the minivan two blocks over, at a gas station on the

corner of Cadillac and East Warren (36-37). The minivan was sitting on the island and the driver's side door was open (37). Then, he looked over to the side and saw Lisa lying on the ground (37). Lisa's three children were still in the minivan (37). The driver's side window was shattered (37). When he returned to his house, he noticed that there was broken glass where the minivan had taken off from, which was right across the street from his house (37-38).

He knew who Justly Johnson was, but not by that name (39). Johnson was called Stank in the neighborhood (39). He identified Johnson in court as the person who he knew as Stank (39). He could not say one way or another if Johnson was the person who he saw running through the field when the minivan took off (40).

On cross-examination, the witness testified that he told the police that the person he saw running through the field was wearing a dark sweatshirt with a hood, dark pants with reflective stripes going down the sides, and white gym shoes (43-44). He also described the person as being tall (44). He was asked whether he thought Johnson was tall; he responded that he thought that Defendant was fairly tall (44).

Detroit Police Officer Terry Wilcox

Detroit Police Officer Terry Wilcox testified that he was also on duty on May 9, 1999 (Waiver Trial Transcript, 01/10/00, 52). He recalled he and his partner going to a Marathon gas station at around 1:30 a.m. on that date (52). By the time they arrived, the victim had been taken away (53). There was a van in front of the gas station door (53). The windows of the van had been shot out; there was a little broken glass outside of the van (55). And there were children in the van (53). He thought that the glass outside of the van had come from the victim opening the door; he explained that when a window is shot out, there is glass that initially falls out and what is left is very

fragile and when the door is opened aggressively, the rest of the glass falls out (55). The small amount of glass he saw at the gas station led him to believe that the initial shattering of the window did not occur there (55). He and his partner assisted in securing the scene (53). He looked around for possible evidence but did not find any in that area (53-54).

He and his partner were then sent to another location to secure the scene there (57). This other location was a residential street (57). Here, he saw glass on the street and a spent casing (57). The spent casing was right by the curb (57).

On cross-examination, Officer Wilcox testified that the spent casing that he found was across the street from the location where Mr. Kindred's relatives lived, which was 4470 Bewick (58-59).

Stipulation (as to spent casing found in front of 4470 Bewick)

The parties stipulated that the spent casing found in front of 4470 Bewick was a .22 caliber long Winchester Super X fired cartridge case (Waiver Trial Transcript, 01/10/00, 81).

Antonio Burnette

Antonio Burnette testified that he knew Johnson, who he identified in court (Waiver Trial Transcript, 01/11/00, 8-9). He knew Johnson from the neighborhood, but he only knew him by the nickname Stank (9). He also knew a person whose nickname was Snoop, who he also knew from the neighborhood (9). Johnson (Stank) and Snoop were friends (9).

He saw Johnson and Snoop on the evening of May 8, 1999 (9). He saw them at a house on Bewick and Hurlbut (9). The house was not Johnson's or Snoop's; it was somebody else's house (10). He had a conversation with Johnson and Snoop at that time (10). Johnson said that he was going in the house to use the phone and that was what he did (10). When he came back out, Johnson asked him if he wanted to go over to some female's house with him (10).

At 10:30 p.m. that evening, he (the witness) went with his father (12). When he returned to the area of Bewick and Hurlbut later, at around 2:30 a.m., he saw Johnson and Snoop again at somebody's house on Bewick, whose name he did not recall (12). Then, he and Johnson went over to some female's house (13). After they left the female's house, they got into a car with Mike and the three of them went to his (the witness's) sister's house because she was supposed to be having a party (13). Finding nobody there, they came back to Bewick (13). Snoop was still there on Bewick (13). At that point, Snoop told him something, and Johnson participated in this conversation (14). After Snoop said whatever it was he said (there was an objection by defense counsel as to what Snoop said), Johnson also said that Snoop shot her (14). After Snoop said what he said, and Johnson said what he said, he (the witness) learned that a woman had been shot; he found this out when he went to go get a "blunt" and he saw an ambulance and the police in the neighborhood (16).

The next morning, he was interviewed by the police, and he gave them a written statement (16-17). The police wrote the statement out, and he read it and signed it (17). He made an effort to tell the police everything that he knew about the lady getting shot (17). He told the police that Johnson said that Snoop had shot somebody (19). He testified that this was true (19).

The witness also acknowledged having testified at the preliminary examination that before his father came and picked him up, Snoop and Johnson had talked to him about their plans for the night (20). He acknowledged having testified at the preliminary examination that Johnson and Snoop had been talking about "hitting a lick" that night (20). The witness testified that what he had testified to at the preliminary examination had been true, and it was still true (20-21). He acknowledged having testified at the preliminary examination that Johnson and Snoop talked to him

about coming with them to “hit a lick,” but that he told them no (22-23). That was true then, and it was still true (23).

After his father dropped him back off on Bewick, and after Johnson and Snoop told him about Snoop having shot a woman, Johnson said that he was going to make a phone call, and Johnson asked him if he wanted to go over to some female’s house (24). After Johnson made his phone call, he heard Johnson then call his girlfriend and ask her to come and get him (24).

When Johnson was talking about how Snoop had shot the lady, Johnson said that the reason that she was shot was because she owed Snoop some money (24). The witness was then asked if, at the preliminary examination, he had testified that the reason that the lady was shot was because she would not come out with any money; he responded that he did say that at the preliminary examination, and that that was true (25).

When asked if Johnson said anything about the type of gun that was used on the night in question, the witness responded that Johnson told him that it was a rifle, an AK (28). When asked if he saw either Johnson or Snoop with any kind of gun that night, the witness responded not that he remembered (28). After having his memory refreshed with his preliminary examination testimony (28-29), the witness testified that he saw Johnson and Snoop with an AK-47 and a .22 (30). When asked if he saw what happened to those guns, the witness responded that he saw Johnson take a sheet out of Snoop’s house and wrap up one of the guns and put it in his girlfriend’s car (30-31). The next morning, he saw Snoop put the other gun in his girl’s car (31).

After he had the conversation with Johnson and Snoop, he got into Snoop’s car and went to sleep (31). He was awakened the next morning by a police officer, and taken downtown to answer questions about the lady getting shot (31).

It was sometime after he got out of the police lockup, after giving the police a statement, that he received a communication that he was going to get killed (32).

On cross-examination, Burnette testified that he knew a person named Rita (32). He went to Rita's home with Johnson at some point on May 9 (32-33). From there, he and Johnson went to a 4H club, and from there they went back to Rita's house (33). He did not know what time this was; all that he knew was that it was at night (33). He and Johnson spent an hour at Rita's house and then from there, they walked to a place where he bought some weed (34). From there, he and Johnson went to a store on Warren and Pennsylvania (34). He still did not know what time this was (34). He and Johnson then ran into a cousin of his (the witness's) who told them about a party that his sister was having at her house (35). He and Johnson then went to the Amoco gas station on the corner of Warren and Cadillac (35). There were no ambulances or police cars at this gas station at that time (35). At that gas station, they met Mike, a friend of his (36). He and Johnson got in Mike's car and they drove to his sister's house to find that his sister was not even there (37). They then drove around for about half an hour, and then Mike dropped him and Johnson off on East Fort (38).

The witness acknowledged that he had been drinking and smoking marijuana during the day (39-40). He did not think that his drinking and smoking had any effect on his ability to talk, see, or hear (41). The witness testified that when the police got him out of the vehicle, he thought that he was under arrest, maybe a suspect in this case (41). When asked if he was afraid of being at Homicide, he responded that he was not (41). The police told him that he would be charged with this homicide, but that did not scare him (45). At Homicide, an officer wrote out his statement, which he signed (42). He acknowledged that in that statement, he said nothing about Johnson

having said that he participated in this shooting (42-43). That was true then, and it was still true now (43).

About guns being put in cars, the witness acknowledged having testified at the preliminary examination that he saw Snoop put the gun in the trunk of the car at 7:00 or 8:00 a.m. on May 9 (43-44).

He testified that it was after Mike dropped him and Johnson off that he saw an ambulance (48).

On redirect examination, the witness testified that when he had the conversation with Snoop about hitting a lick, Johnson was there, but Johnson did not participate in the conversation (48). The witness then acknowledged that at the preliminary examination, he testified that both Johnson and Snoop talked about hitting a lick (49). Also on redirect, the witness reiterated that his father picked him up from the neighborhood at around 10:30 p.m. and took him with him to take his aunt someplace (49). He reiterated that it was around 2:30 a.m. when his father then dropped him back off in the neighborhood, around Bewick and Hurlbut (50).

The witness reiterated that he saw Johnson and Snoop putting guns in their girlfriends' cars (50). He was asked if he saw this before or after he had the conversation with them about the lady getting shot; he responded that he saw this after he had the conversation with them about the lady getting shot (51). He knew that Johnson put the gun in his girlfriend's car that night, and that Snoop put the gun in his girlfriend's car the next morning (51). He saw Snoop do this after he went to sleep in Snoop's car, but before the police came and got him out of that car (52).

The witness was asked about when he saw the ambulance and stuff at the gas station (52-53). He was asked if Johnson was with him when he saw this; he responded that Johnson was not with

him then (53). He had gone up to the gas station but they would not let him in (53). He testified that he never did see Johnson any more that night (54). He was then asked when he had the conversation with Johnson and Snoop about the lady getting shot; he responded that that was around 3:30 a.m. (54). The witness was asked how he could have a conversation with Johnson if he never saw him again that night (54). The witness responded that he had gotten back from being dropped off by his father at around 2:30 a.m., that he, Johnson, and Snoop all chilled out at Snoop's house, smoking a blunt (weed), and then Johnson left, and Snoop said that he was going to bed, so he went out and stuck around for a minute, and that is when he went up to the gas station, to buy another blunt (cigar), and he saw the ambulance and they would not let him into the gas station (54-55). He then went back to Snoop's car (55). When asked when it was that he had the conversation with Johnson and Snoop, the witness responded that it was before Johnson left Snoop's house (55). He was asked when it was that he saw the guns being put into the cars (55). He responded that he saw Johnson do this before he went to the gas station, and he saw Snoop do this the next morning (55).

The witness was asked when it was that he and Johnson were riding around in Mike's car; he responded that it was before his father picked him up to go to his aunt's (56). When his father picked him up, neither Johnson nor Snoop were with him (56). The witness then testified that Johnson and Mike were with him when he saw the ambulance and the police cars at the gas station (57). Then, Mike dropped him and Johnson off on East Forest, and from there, they went to Snoop's house, and from Snoop's house, he and Johnson went around the corner of Bewick, and that is when the police told them to walk on the other side of the street (57).

On examination by the court, the witness was asked if he was able to see what type of gun Johnson put into the trunk of his girlfriend's car; he responded that he was not able to see what type

of gun it was, except that it was a long gun (60). When asked if he knew who had the AK-47, the witness responded that Snoop had that gun, and that Johnson had a .22 rifle (60-61). Also on the court's examination, the witness testified that when he went up to the gas station to get a cigar, it was then that he saw the ambulance (61). After seeing that, he came back and they all went in the house, they being he, Johnson, and Snoop (61). They then went around the corner, and his older brother came around where they were and talked to Snoop and Johnson and asked him why he was not at home (61). When his brother left, he, Johnson, and Snoop went back to Snoop's house and started talking and smoking weed (61-62). It was during this conversation that Johnson said that Snoop had shot the woman because she would not come out with the money (62). Finally, the witness testified, still on the court's examination, that it was before his father picked him up that he had the conversation with Johnson and Snoop about hitting a lick, which, he said, meant to rob somebody (64). Johnson said that that was what they were going to do, and Snoop invited him to join in (64).

On redirect examination by the prosecutor, the witness testified that when he saw the guns taken out and put in the cars, one was wrapped in a blanket, and one was wrapped in a sheet (66). He had seen the guns before they were wrapped up (67).

Raymond Jackson

Raymond Jackson testified that he knew Johnson from the neighborhood for some years (Waiver Trial Transcript, 01/11/00, 68-69). He knew him by the nickname Stank, but he also knew that his name was Justly (69).

In the early morning hours of May 9, 1999, there was a shooting that occurred outside of his house on Bewick (69). He actually heard the shot (70). He had been in his living room asleep, and the shot woke him up (70). He did not look outside immediately, but at some point, he did (70).

What he saw when he looked out was a police car (70). The police car was in front of the field next to his house (70).

He saw Johnson later on that same morning as Johnson was getting out of the car with his mother (71). Johnson came down to his house and asked him about all of the TV cameras that were outside, and he answered Johnson (71-72). Johnson then came in his house and said Happy Mother's Day to his (the witness's) grandmother (72). Johnson then told him about what had happened outside of his house (72). Johnson told him that he did a lick (72). When asked what this meant to him, the witness testified that it had a number of meanings, like winning at a dice game or getting over on somebody, and it also meant robbing somebody (72-73). Johnson also told him that he messed up and he had to shoot (73). When asked if he thought that Johnson was talking about shooting craps when he said that he had to shoot, the witness responded that he did not know, because Johnson was so drunk (75).

The witness was asked about two statements he made to the police (75). He made the first statement the night of the shooting before he talked to Johnson (75). He made a second statement to the police a day or two after his first statement (76). In the second statement, he told the police about Johnson having come over to his house (76). The police knew about Johnson having been over at his house because the police arrested Johnson when he was coming out of his (the witness's) house (76).

The witness continued with his testimony, testifying that Johnson said that the shooting happened by the field, by the vacant lot next to his house (77). Johnson told him that it had been him and Snookie (77). He testified that Snookie's real name was Kendrick Scott, who lived on Hurlbut (77).

The witness testified that on the night of the shooting, he saw Snookie hand his girlfriend, a girl who lived down the street from him (the witness), something long wrapped up in clothes (79). He saw this after the shooting had occurred (79).

The witness testified that at some point he got locked up on the 9th floor of police headquarters (79). Johnson and Snookie were also on that floor (79). Snookie kept hollering out something all night that caused him distress (80). There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." (81-82). Johnson also said that whatever he (the witness) told the police, he (Johnson) was going to fuck him up (83).

On cross-examination, the witness testified that he had a brother named Eugene Jackson (84). Eugene did not live where he lived (84). When asked if had a good relationship with his brother, he responded, "Sometimes." (84). The witness testified that his brother helped him with taking his medications and going to the doctor and stuff (85). The witness acknowledged taking a lot of medications, which included Zoloft and anti-abuse medicine, and he acknowledged that his medications made his vision blurry and made him forget things (86). He had just recently been at Riverview and Mercy Hospitals because of his medical condition, which was, that sometimes he heard things, voices (87). He testified that he was currently suffering from depression (104).

The witness testified that the second time that he was taken down to Homicide, the time that he actually stayed in jail there, the police did holler at him, but as far as them threatening him, they told him that they wanted to know what Stank had told him, and that if he did not tell them he could go to jail (94-96).

The witness testified that Johnson never told him that he hurt anybody (100). All that Johnson told him was that he had hit a lick, and that he messed up and had to shoot, but he did not say that he killed or hurt anybody (100). The witness testified that on the day that Johnson told him this, which was at his (the witness's) house, he and Johnson were in the house drinking, and he saw the detectives who he had talked to earlier outside (101). They asked him who Stank was and that is when Johnson came out of the house (101). The detectives approached Johnson and asked who he was, and Johnson told them that he was Stank (101).

On redirect, the witness testified that his brother Eugene was a good friend of Johnson's (111). He testified that his brother Eugene was in court now and had been sitting in court all of the time that he had been testifying (112). He testified that his brother approached him during lunchtime, and, in her (the prosecutor's) presence, told him that he did not appreciate him testifying (112).

The witness testified that Johnson came over to his house after the police brought him (the witness) back to his house, which was around 7:00 a.m., after he gave the police his first statement (117). Johnson came over in the afternoon, around 1:30 or 2:00 p.m., on May 10 (117). It was while he and Johnson were in his house that he looked out and saw the same detectives he had seen earlier at the police station (117). That was when he went outside and they asked him if he knew Stank (117). They had not asked him about Stank when he was at the police station earlier (118). Johnson was in his house at this point (118). When Johnson came out and identified himself as Stank, the detectives took Johnson away (118). It was then later that day that they came and got him (the witness) (118). It was then that he made his second statement, the one in which he told the police that Johnson told him about hitting a lick and messing up and having to shoot (118).

Defense**Eugene Jackson**

Eugene Jackson testified that Raymond Jackson was his older brother (Waiver Trial Transcript, 01/11/00, 138). They looked out for each other (138). He never took Raymond to the doctor or anything, but that was something that he would have done (138). He would see Raymond everyday, and they discussed this case (138). He knew Johnson as Stank (139). Johnson was a friend of his (139).

He was aware that there had been a conversation between Raymond and Johnson at his grandmother's house on May 10 (139). As far as what the conversation was about, Raymond told him that Stank came over drunk, that Stank wished their grandmother a happy Mother's Day, after which Stank sat down and talked to him (139). Raymond told him that Stank had told him that he (Stank) had hit a lick shooting dice (139-140).

On cross-examination, the witness acknowledged that he had a conversation with Raymond in front of the building during a break in this trial and that she (the prosecutor) was present for the conversation (146-147). He acknowledged that he told Raymond that he did not appreciate the way that he was testifying, that he did not think that he (Raymond) would do Stank like that (147). He also acknowledged that Raymond's response at that time was that he was just telling the truth (147). He acknowledged that Stank was his very good friend and had been for 16 years (148).

On redirect, the witness testified that he was upset with his brother when he said these things in front of the prosecutor because he felt that his brother was not being truthful because Raymond had told him that Stank had told him that he hit a lick shooting dice (150).

Justly Johnson

Justly Johnson testified that his father had given him the nickname Stank when he was a child (Waiver Trial Transcript, 01/11/00, 151).

He testified that he had contact with the police when he was at Raymond Jackson's house (151). How that came about was that the police were outside, and he walked up to them and gave them his name, and they took him downtown for questioning (151-152). At the time, he was residing with Yolanda Holt (152). He kept some of his personal belongings there (152).

At about 6:00 p.m. on May 8, 1999, he was on Warren and Connor; his girlfriend dropped him off there (153). From there, he went to Keesha's house on St. Clair Street, where he stayed until about 9:30 p.m. (153). Then, he went over to Kendrick Scott's house (153). Kendrick Scott's nickname was Snookie (159). Antonio Burnette, who he only knew by the nickname Shorty, was there (154). Then, he and Shorty left Scott's house; Scott did not go with them (154). They walked up Hurlbut Street and then some other streets on their way to a Rita's house (154). He was going to hook Shorty up with Rita's cousin (155). He and Shorty then left Rita's house after a time and walked down various streets until they ran into Shorty's friend Mike at a gas station at Warren and Cadillac; this was around 12:00 a.m. (155). There was nothing happening at this gas station at that time (156). They got into Mike's vehicle, and they all went looking for Shorty's sister's house because Shorty said that his sister was having a party (156).

At some point, Mike dropped him and Shorty off back at the gas station at Warren and Cadillac (157). It was now around 1:00 or 1:15 a.m. (157). There was a bunch of police cars at the gas station (157-158). As they were walking up toward the gas station, Shorty told him to act like his father (158). As they approached the gas station, a police officer told them to get the fuck

away, so they went to the gas station across the street (158). From the gas station, he and Shorty went over to Kendrick Scott's house; it was now around 1:30 a.m. (159). He talked to Snookie about seeing the police at the gas station (159). Snookie and Shorty then left and he stayed at Snookie's house and used the phone (159). He called his girlfriend Yolanda Holt to come and get him and she did (159-160). This was around 2:30 a.m. (160). Holt took him over his mother's house (160). His mother was not there when he got there, so he and Holt sat in the car and talked for awhile (160). Holt then left and he went into his mother's house (161).

The next day, Holt came over and told him that the police were looking for witnesses in this case and that his name had come up (161). Upon her telling him that, he went over to Bewick Street, where his auntie and also Raymond Jackson lived (161). He got dropped off at his auntie's and he went down to Raymond's house (161). Raymond's grandmother was there (162). He never had any conversation about what he had seen at the gas station, about ambulances being there, nor did he say anything about hitting a lick (162). He just talked to Raymond about the neighborhood, and how it had changed since he had moved away (162). Then, the police pulled up outside, and, since he knew that they were looking for him as a witness, he went out there and approached them (162). They asked him to come with them, and he cooperated (163). He went downtown with them (163).

He never threatened Raymond (163). Furthermore, he never had a gun on him that night (160). He never carried a gun (160). He had nothing to do with the shooting (163).

Trial Court's Findings of Fact and Verdict

The trial court found Johnson guilty as charged (Waiver Trial Transcript, 01/12/00, 21-31).

Evidentiary Hearing on Remand

The evidence and testimony at the evidentiary hearing on remand from this Court included the following:

Antonio Burnette

Antonio Burnette testified that he knew Defendants Justly Johnson and Kendrick Scott (“Motion” Transcript, 04/08/15, 8). He recalled testifying against these two Defendants at their respective trials relative to the murder of a woman on a particular night, that being May 9, 1999, in his neighborhood (8-9). He did not witness the murder himself, nor was he at the scene of the murder (9). At the time of the murder, he knew both Defendants, in that he hung around with them (9).

The testimony that he gave against the two Defendants was not true (10). Neither of them ever confessed to him of robbing or shooting the woman who got killed on the night in question (10). Nor did he ever see either Defendant carrying a gun that night or the day after (10).

The reason that he gave false testimony against the two Defendants was because the police had caught him with an ounce of weed, and they gave him some paperwork to sign, and his being a minor at the time, and not knowing what was going on, he signed it (10). He was afraid of the police, and thought that he would be charged with the murder (10). The police actually told him that he would be charged with the murder if he did not testify against the Defendants (11).

At the time of the murder, at around 12:00 a.m. or 1:00 a.m., on May 9, 1999, he was with Johnson, who he referred to as “Stank” (11). They were hanging out on Mount Elliot and Vincent, at his cousin’s house, and they left there and went to the home of another of his cousins (11). He was not on Bewick Street at the time of the shooting (12).

Neither of the Defendants threatened him or anyone in his family to testify at the proceeding (12). Nor was he threatened or coerced by anybody else to get him to give the testimony he was giving at this hearing (12). He was currently in prison for fleeing and eluding, but he would be eligible for parole on April 21 (12). The reason that he was giving the testimony that he was giving now was because by being in prison, he had time to think about the hurt that he had done to other people, and in order to change his life, he had to change the bad that he had done to other people (12).

On cross-examination, the witness was asked if at the preliminary examination of the two Defendants, he had been asked by Scott's attorney if he was afraid of "these men at this time?," to which he responded, "Yes." (13-14). He responded that he did not recall being asked that question, and giving that answer, but after reviewing the preliminary examination transcript, he acknowledged that he was asked that question and did give that answer (14). When asked if it were true that he was afraid of the two Defendants at that time, the witness responded that that was what the police wanted him to say, that is, the police told him that if Scott's attorney asked him if he was afraid of the two Defendants, he was to say that he was (14-15).

The witness was then asked if at Scott's trial, he was asked the following questions, and gave the following responses:

Q When the police were questioning you, did they threaten you to get you to tell what you knew?

A No.

Q Did they promise you anything to get you to tell them what you knew?

A No.

Q They advised you of your rights, however?

A Yes.

Q You're aware that you were under some suspicion?

A Yes.

Q Have you had any threats by anyone at all in connection with your telling the police and testifying?

A Yes.

Q From who?

A From the guys that be around the neighborhood. They come back and tell me things.

(15-16).

The witness testified that he recalled this testimony, but it did not change the fact that the police gave him a piece of paper and told him what to say and how to say it (16). When asked if, when the attorney asked him at Scott's trial if he had been threatened by the police and he said, "No," that was a lie, the witness responded that it was (16). And it was also a lie when the attorney asked him if he had been promised anything to get him to tell what he knew, and he responded, "No."

On examination by the trial court, the witness was asked why he should be believed now when he was sworn to tell the truth at the trial of the two Defendants, and was now saying that he lied at those two trials (17). The witness acknowledged that he had been sworn to tell the truth at the two trials (17). When asked why his current testimony should be believed as opposed to the testimony that he gave at the trials of the two Defendants, the witness responded that back then, the

police had “whooped” on him when he was in custody (17). The witness was asked if it were not true that he did not know the specific questions that he would be asked at trial (18). He responded that the police wrote down a list of questions (18). When the trial court asked the question again, the witness acknowledged that he did not know the specific questions that he would be asked at the trials (18).

Charmous Skinner, Jr.

Charmous Skinner, Jr. testified that he went by the nickname CJ (“Motion Transcript, 05/15/15, 6). He testified that his birth date was September 24, 1990 (7). His parents were Charmous Skinner and Lisa Kindred (7). He had lived in Michigan from the time that he was three years old until his mother was murdered (7). He was eight years old when his mother was murdered (7). At the time that his mother was murdered, he was living with his mother, her husband Will Kindred, his little sister, and his little brother (7). He had a close relationship with his mother (8).

He recalled the day that his mother died (8). It was May 9, 1999, Mother’s Day, in the early morning (8-9). He was with her when she died (8). She died at the gas station (9). His mother was killed in the car (9). He was in the front seat (9).

Earlier that evening, they had all gone to a drive-in movie (9). After the drive-in movie, they went to Will’s family’s house (9-10). He had been to this neighborhood before (9). His mother drove (9). When they got there, Will got out of the car and went into the house by himself (10). He was in the backseat at the time (10). Once Will got out of the car, he moved up to the front seat (10). He, his mother, and his siblings then waited in the car (10). His mother appeared to be agitated as they waited for Will (10-11). His mother was huffing and puffing under her breath, and

swearing a little bit (11). His mother did not stay in the car the whole time (11). She got out of the car and went up to the house that Will had gone into (11). She knocked on the door, and, after a brief “altercation,” she returned to the car (11).

It was when his mother got to the door of their car and opened it that he saw somebody (12). This somebody was an African-American man in his mid-30s, short, with short hair, a big beard, and a “big ass” nose (12-13). There was no light in the area except from the light from the car, that being the light that comes on when the car door is open (13). The man was behind his mother, not directly, but off to the side (113). He (the witness) was sitting in the front passenger seat when he observed this (13). He saw nobody else in that street but this man (13).

As the man approached his mother, he (the witness) heard a gunshot (14). When the gunshot went off, the side front window of the car broke (14). He did not hear anything said between the man and his mother before he heard the gunshot (14). He did not see the man take anything from his mother or the car (14). After the gunshot went off, his mother got in the car and sped off to the nearest gas station (15). When they got to the gas station, his mother went to the back of the car, got a bag of ice from the cooler that they had taken to the drive-in movie, and then she got out of the car, “fell out,” and died (15). He did not know at the time that his mother got back in the car that she had been shot (15). By that time, he was not thinking anything, but was just crying (15). He recalled an ambulance arriving (15).

The next morning, Will’s mother told him that his mother had died (15-16). He recalled going to the funeral some time after, and presenting his mother with a Mother’s Day card (16). He never was interviewed by any police officers or lawyers (16). After the funeral, he stayed with Will for about a week, and then he moved to Philadelphia to live with his grandmother (16).

While he was still in Michigan after his mother's funeral, he never talked to Will or his family about what he had seen that night (16). Nor did any of them ask him about it (16). Had a police officer asked him, before he left Michigan, to describe what he had seen that night, he would have told the truth (17). And if a police officer had asked him to view a lineup, he would have been able to identify the shooter if the shooter was in the lineup (17).

Once he moved to Philadelphia, where he lived with his grandparents and his sister, he saw his biological father (17). When asked if any of these people talked to him about his mother's death, the witness responded that they tried to, but he did not want to talk about it (17). He recalled them taking him to a counselor to talk about his mother, but he did not give the counselor any details about what he saw that night (18). The reason that he did not want to talk about it was that he was trying to forget it (18). In the years following his mother's death, he never thought the police needed his account in order to solve the case (18). He thought the police had it all figured out (18).

Eventually, he got a letter from a reporter, Scott Lewis (18). This was around August 31, 2011 (18-19). He responded to Lewis's letter, telling Lewis that he would help if need be, if the dude or dudes were in prison for killing his mother and they did not do it, but that if they did do it, he would help in the other direction (19). Also in his letter, he wrote to Lewis that, "I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf" (20). Lewis was the first person to whom he gave a description of the person (20). He was incarcerated in Pennsylvania when he had contact with Scott Lewis (21). He had been incarcerated for two years (21).

He graduated from high school in 2008 (21). In between the time that he graduated from high school and the time that he went to prison, he had been living by himself, selling drugs (21-22).

What he was in prison for when Scott Lewis contacted him was perjury (22). The charge of perjury, which he pled guilty to, was for lying on the stand (22). He lied to protect a friend who was charged with a double homicide (22).

After he spoke to Scott Lewis, he was contacted by the Michigan Innocence Clinic (23). This was in late 2011 (23). He first spoke to the people from the Innocence Clinic on the phone, and then, when he met with them in person, he was shown a photo lineup (23). He was shown one photo at a time from the array (24). He did not see the person who approached his mother in the photo array (24). When asked if he recognized Johnson or Scott in court, the witness responded that he did not (25).

On cross-examination, the witness acknowledged that in his Affidavit, he did not say that he heard a gunshot (26-27). He stated that he did not think that he needed to put that in his Affidavit inasmuch as the glass shattered, and there was a hole in his mother's chest (27). He acknowledged that he did not see a hole in his mother's chest at the time that he witnessed the event (27).

The witness testified that at the time that the glass shattered, his mother was in the process of getting back into the car, and she was halfway in the car (27-28). He reiterated that when he saw the man, the man was behind his mother, and a little off to her side (28). He assumed that the bullet came through the window (29). He knew that the man had a gun, but he did not know if the gun was a rifle or a handgun because he did not see that (34). Nor did he know if the man had the gun in his right hand or his left hand (34). When asked how long he had his eyes on the guy from beginning to end, the witness responded, "About 25 seconds," but he acknowledged that he was only guesstimating (34). He knew that the man was there long enough for him to get a good look at him

(35). He did not hear the man say anything to his mother (34-35). All of a sudden, the man just shot (35).

The witness testified that it was dark out, but the lighting from the car was good (35). This was because the car door was open, so that the inside dome light was on (35). When asked if that allowed him to see outside of the car, the witness responded, "Yeah, technically speaking, yeah, yeah" (35). He did not remember if his minivan was parked on the right side of the street or the left side (35). He did not see what kind of clothing the man was wearing (36).

The witness testified that when he wrote his response letter to Scott Lewis's letter, he began by saying, "Wow, your letter really surprised me" (36). When asked what it was that surprised him in Lewis's letter to him, the witness responded that it was "they was still trying to find out who killed my mother" (36). The gist of Lewis's letter then was that "they're still trying to find out who really killed my mother" (36). When asked if that suggested to him that the people who had been convicted of it had been wrongly convicted, the witness responded that Lewis did not suggest that (36). Rather, what suggested that were the papers that he got off of the Internet (36). When asked what papers he was referring to, the witness responded "news articles" (36). These were not, however, news articles that he read before Lewis contacted him (36-37). They were news articles that he actually received from Lewis, authored by Lewis, from which he got the impression that the people who had been convicted for his mother's death had been wrongly convicted (36-38). When asked if his thought process, then, from the get-go, was that the two guys had been wrongly convicted, the witness responded that that was not his thought process from the get-go, but when he read "the stuff," it sounded like the police department had done a bad job (38).

Finally, the witness reiterated that had the police interviewed him, he would have given them a statement (38). But he acknowledged that this was so even though afterwards, six months later, he did not want to talk to anybody about it (38). So, the difference was the time frame (39). Had the police interviewed him on the night of the incident, he would have talked to them, but after the funeral he did not want to talk to anybody (39).

On examination by the trial court, the witness was asked if his mother and Will Kindred were getting along okay in the van when they were at the drive-in movie (47). He responded, "Yeah. I mean, yeah, I guess" (47). When asked what grade he would have been in at the time, the witness responded that he did not know (47). Nor did he know what school he went to at that time (48). When asked if he remembered the name of his teacher, the witness responded, "If I don't know the school I went to, how would I know the name of my teacher?" (48). When asked what kind of grades he got back then, the witness responded that he always got good grades, so he would assume that his grades were good back then (48-49). When asked what his favorite subject in school was, the witness responded that he had no favorite subject because he did not like school (49).

On further examination by the trial court, the witness testified that it was pitch black outside (52). The court asked these questions and got these responses:

THE COURT: A dome light and a van light shines down on the people that are inside the compartment and doesn't really show anything outside, does it?

THE WITNESS: It does.

THE COURT: Oh, it does?

THE WITNESS: Yeah.

THE COURT: All right. Were there lights outside at the time this incident happened?

THE WITNESS: I don't recall.

THE COURT: Was the porch light on of the house that your mom went to?

THE WITNESS: I don't even think they have a porch. I don't remember a porch.

(54-55).

On further examination by the trial court, the witness was asked these questions and gave these responses:

THE COURT: It's a van, okay. Now you said that there was a person that was behind her?

THE WITNESS: Yes.

THE COURT: How far behind her was this person?

THE WITNESS: Maybe six inches.

* * * *

THE COURT: And would it be fair to say that your mother was between you and this man that came up behind her?

THE WITNESS: Between me?

THE COURT: Your mother –

THE WITNESS: The car. She was between herself, the car, and the car door. That's what she was between.

THE COURT: Okay, all right. So the door was partially open, and she was inside the door?

THE WITNESS: When she was shot?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: Okay. And this other individual, this man that was behind her would have been outside the door, right?

THE WITNESS: Yes.

THE COURT: About how far away from the side of the van would you say he was?

THE WITNESS: Same amount of space.

(57-58).

* * * *

THE COURT: Now your mother and this person who killed her, basically, you never heard them say anything to each other?

THE WITNESS: No.

THE COURT: You said that this person came up behind your mother and there wasn't anything said between them, and the next thing you knew she had been shot and the window shattered to the van, correct?

THE WITNESS: Yes, next thing I knew –

THE COURT: That's all I asked you.

(62-63).

* * * *

THE COURT: Okay. The amount of time that she was outside the van and this person was behind her with nothing being said, how many second went by from the time she got up to the side of the van and the window shattering? Let's put it that way.

THE WITNESS: I don't know, I'm not going to estimate. I don't know.

THE COURT: Like real quick?

THE WITNESS: Long enough for me to see his face.

THE COURT: That's not what I asked you.

THE WITNESS: I'm saying you asked me how long.

THE COURT: That's not what I'm asking you.

THE WITNESS: How long do you need to recognize somebody?

THE COURT: That's not what I asked you. I'm asking you for a time.

THE WITNESS: I don't know.

(63-64)

* * * *

THE COURT: I imagine you must have found it pretty interesting to be contacted by Mr. Lewis concerning this?

THE WITNESS: Yes.

THE COURT: Had anyone else ever contacted you concerning the defendants in this case, Justly Johnson or Mr. Kendrick Scott?

THE WITNESS: Yes.

THE COURT: Concerning their involvement or noninvolvement in this incident?

THE WITNESS: Yes.

THE COURT: Who else?

THE WITNESS: Wisconsin people.

THE COURT: The people in Wisconsin?

THE WITNESS: Yes.

THE COURT: At the University of Wisconsin Innocence Project?

THE WITNESS: Yes.

(69-70).

* * * *

THE COURT: When the people from the University of Wisconsin Innocence Project spoke with you, did they show you any photo array?

THE WITNESS: No, I spoke with them on the phone one time –

THE COURT: That's all?

THE WITNESS: – and that was that.

THE COURT: And at the time the window broke on the van in which you were situated when your mother was shot, you can't tell us as to whether she was shot by either a handgun or a rifle?

THE WITNESS: No.

THE COURT: How many shots did you hear?

THE WITNESS: One.

THE COURT: One? And did you see a flash or muzzle flash from the gun?

THE WITNESS: No.

(71).

On redirect, the witness testified that when he got the phone call from the Wisconsin Innocence Project, he did not give them a description of the shooter (73). Scott Lewis was the first person to whom he gave a description (73).

On recross, the witness testified that when the Wisconsin Innocence people contacted him, the only question they asked was, "Did you see what happened to your mother," to which he responded that he did (74). The Wisconsin Innocence people did not ask him if he could describe the person who did the shooting (74). He testified that the Wisconsin Innocence people said that they were going to fly out to see him in Pennsylvania, but he never heard from them again (75). This was in 2007 (75).

Argument

I. The trial court did not abuse its discretion in denying Johnson's motion for new trial based on newly discovered evidence due to its finding that the testimony of the victim's son was neither credible nor veracious.

A) Johnson's Claim

Johnson claims that the trial court abused its discretion in denying his motion for new trial on the basis of the *Cress* test for newly discovered evidence, where the victim's son, CJ Skinner, Jr, testified that neither Johnson nor Scott was the perpetrator.

B) Counterstatement of Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A mere difference in judicial opinion does not establish an abuse of discretion. *Id.* A trial court's factual findings are reviewed for clear error. *Id.*

B) The People's Response

To warrant a new trial based on newly discovered evidence, a defendant must make the following showings

1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

Cress, 468 Mich at 692.

Obviously, Johnson is basing his claim of innocence primarily on the testimony of Charmous Skinner, Jr.

The *Cress* factor that is truly at issue here is whether the trial court abused its discretion in finding that Skinner's testimony would not make a different result probable on retrial. In so finding, the trial court obviously found that Charmous Skinner's testimony was not credible. And what is clear is that a reviewing court should not substitute its own opinion of credibility for that of the trial court, as the recent Order of this Court in *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015), indicates. That is so, of course, because the trial court is in a superior position to assess the credibility and veracity of witnesses.

Before discussing Skinner's testimony, however, the People should like to address the testimony that convicted Johnson, and for that matter, Scott. Both Antonio Burnette and Raymond Jackson gave testimony that was consistent at both trials, that is, the trial of Johnson and the trial of Scott. And the testimony was unwavering even in the face of attempts at intimidation and pressure. Indeed, at the preliminary examination of both Johnson and Scott, the attempt at intimidation by Johnson and Scott was apparent enough to cause the examining magistrate to comment on it:

THE COURT: He's [referring to Antonio Burnette] looking down to keep from looking at your clients that keep looking at him and touching their face. I don't know if it's a threat, or sign language within the community, or what.

DEFENDANT SCOTT: I wasn't doing nothin.'

THE COURT: Oh, you did like this and you did like this.

DEFENDANT SCOTT: I have a nervous problem.

THE COURT: And like this and like that. And the one named Stank, he did like this, goes like this, glaring at him. I don't know what those looks in the neighborhood mean. It's just like I don't know what lick means.

Sir, keep your hand down.

(Preliminary Examination Transcript, 05/26/99, 43-44).

* * * *

THE COURT: Well, I'm watching his (referring to Antonio Burnett] demeanor and it seems like he's scared to death of these two young men that you are representing.

MR WILLIAMS [Counsel for Scott]: That may be true, your Honor. That may be the Court's interpretation. Maybe he's not afraid of these guys.

BY MR WILLIAMS:

Q Are you afraid of these men at the time?

A Yes.

Q You are?

MR. WILLIAMS: Terrible answer, your Honor.

MR. FURTAU [Assistant prosecutor]: Well –

THE COURT: Well, I've been sitting here awhile and I've seen a number of cases, and I can usually call it pretty good.

(Preliminary Examination Transcript, 05/26/99, 61).

And, as far as Raymond Jackson, this witness stuck to his story even though Johnson and Scott tried to intimidate him while the three of them were in police custody together.¹ Also, at Johnson's trial,

¹ As noted previously, Jackson testified at Johnson's trial that at some point he got locked up on the 9th floor of police headquarters (Waiver Trial Transcript, 01/11/00, 79).

on cross-examination of Eugene Jackson, Raymond Jackson's brother, who testified for the defense, Eugene Jackson acknowledged that he had a conversation with Raymond in front of the building during a break in the trial and that she (the prosecutor) was present for the conversation (Waiver Trial Transcript, 01/11/00, 146-147). He acknowledged that he told Raymond that he did not appreciate the way that he was testifying, that he did not think that he (Raymond) would do Stank like that (147). He also acknowledged that Raymond's response at that time was that he was just telling the truth (147). He acknowledged that Stank was his very good friend and had been for 16 years (148).

The People simply do not see Johnson's and Scott's attempts at intimidation as being consistent with innocence.

Maybe Antonio Burnette and Raymond Jackson were messed up about times, but Burnette was consistent in his testimony about what Johnson and Scott told him, and Jackson was consistent in his testimony about what Johnson told him. And a fact that corroborates Burnette's testimony is that a spent .22 caliber long Winchester Super X fired cartridge casing was found in front of 4470 Bewick (Waiver Trial Transcript, 01/11/00, 81), and Burnette testified that he saw Johnson and Scott with an AK-47 and a .22 rifle (Waiver Trial Transcript, 01/11/00, 30; 60-61). As to Johnson's claim of innocence that is based primarily on the testimony of Charmous Skinner, Jr., the People would first note that whether the trial court found Skinner to be credible is the linchpin inquiry.

Johnson and Snookie (Scott) were also on that floor (79). Snookie kept hollering out something all night that caused him distress (80). There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." (81-82). Johnson also said that whatever he (Jackson) told the police, he (Johnson) was going to fuck him up (83).

And, as noted previously, a reviewing court will give deference to any credibility finding that a trial court makes. See again this Court's Order in *Tyner, supra*.

The People believe that there are a number of reasons why Skinner's testimony should not have been believed, and why the trial court did not believe it.

First, a seed was planted in Skinner's mind, if not in 2007 when the Wisconsin Innocence Project contacted him and asked him if he witnessed the shooting, then by way of Scott Lewis's letter to him and the articles that Skinner said that Lewis gave to him, that the person or persons who had been convicted of his mother's murder had been wrongly convicted.² That would then explain why he would not pick anybody out of the photo array. He could certainly surmise that the photographs of the "wrongly convicted" persons would be in the photo array. This would also explain why Skinner did not seem to want to answer the trial court's question about how long the episode took. Skinner's response, as if reading from a script, was that it took long enough for him to see the face of the shooter, and when told that that was not the question, Skinner persisted in not answering the question, until finally he relented and just said that he did not know. Furthermore, and one would have had to have been at the evidentiary hearing, the whole tenor of Skinner's

² Charmous Skinner, Jr. testified that the Wisconsin Innocence Project contacted him in 2007, and asked him, "Did you see what happened to your mother," to which he responded that he did, but they did not ask him if he could describe the person who did the shooting.

The Wisconsin Innocence Project got involved in Johnson's case before they filed his third Motion for Relief from Judgment. It was after Johnson filed his in pro per second Motion for Relief from Judgment, and Judge Edwards denied that, that the Wisconsin Innocence Project got involved by filing on Johnson's behalf an Application for Leave to Appeal to the Court of Appeals to appeal Judge Edwards's denial of Johnson second Motion, and after the Court of Appeals denied that on February 1, 2009 (Court of Appeals No. 287529), the Wisconsin Innocence Project filed on Johnson's behalf an Application for Leave to Appeal with the Supreme Court, which was denied on September 28, 2009 (Supreme Court No. 138618).

demeanor on the People's cross-examination of him, and certainly the trial court's examination of him, was of impatience and evasiveness, if not downright impertinence.

Second, the picture that Skinner drew at the evidentiary hearing when he testified was a before and after picture. The before picture that he drew shows his mother standing outside of the van in front of the man and slightly off to his right, and the after picture shows her halfway into the van, with the van door open, and the door separating his mother from the man. It is hard to fathom how, if this was the scenario, why the man would let the victim get into the van at all.

Finally, the trial court, in questioning Skinner, made a point or at least suggested that sitting in the passenger seat with the dome light of the van on against a dark outside background would have made it, if not impossible, very difficult to see anything out in the dark.³

None of the findings made by the trial court, with the exception of its finding that Skinner would have slept through the movie at the drive-in theater, which was speculative, were clearly erroneous. Certainly, the trial court's finding that Skinner's previous conviction for perjury in a murder case was indicative of his lack of veracity, that is his disposition to tell the truth, was not

³ The People are cognizant that Johnson and Scott have attached three cases where the courts in those cases found it reasonable that a car's dome light could illuminate somebody outside of the car. The People submit that those cases are distinguishable in that the identifier of the person standing outside of the car was not inside the car with the light shining down into the inner compartment of the car, as Skinner was. In *Tyner*, the identifier was in a different vehicle when he said that he viewed Tyner by way of the dome light of the vehicle that Tyner was in (the Opinion does not say whether the person the identifier identified as Tyner was inside or outside of the vehicle). In *Seals v Rivard*, the identifier was either in the driver's seat of his car or outside of the car when he said that he saw by way of his dome light the two robbers standing outside of his car. There would be a difference, the People assert, between sitting in the driver's seat and looking out because the dome light would be shining behind the identifier, and sitting in the passenger seat and having to look through the dome light out into the dark. And finally, in *Caldwell v Lafler*, the identifier was standing *outside* of his vehicle getting robbed and he was able to see the robber by way of his dome light.

clearly erroneous. Nor was the court's finding that Skinner's mother would have blocked Skinner's view of the perpetrator clearly erroneous. Nor was the trial court's finding that Skinner would not remember with any type of detail the perpetrator's face after 16 years.

II. When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. According to this Court's Remand Order, the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Justly Johnson or Kendrick Scott, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial; the trial court was not directed by the Remand Order to give an opinion about the type of murder involved or the motive for the murder. But the trial court also did do what it was directed by this Court's Remand Order to do, that is, to again, determine whether the testimony of Charmous Skinner either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial, and the trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Johnson nor Scott. Reversal of the trial court's Order denying Johnson's Motion for Relief from Judgment is not warranted.

A) Johnson's Claim

Johnson makes three (3) claims: (1) that, at trial, robbery was the only theory presented, and thus, it was necessary to securing Johnson's felony murder conviction; (2) that, as Judge Callahan found, the newly discovered evidence convincingly discredited the robbery theory that the prosecution relied on at trial to meet the critical enumerated felony requirement of felony murder; and (3) that being convinced that the evidence at the hearing entirely defeated the robbery theory, Judge Callahan plainly abused his discretion in denying Johnson's Motion for Relief from Judgment.

B) Counterstatement of Standard of Review

Whether the trial court exceeded the scope of its authority on remand is a question of law, which this Court reviews de novo.

C) The People's Response**i) Claim that showing the commission of the attempt to commit an enumerated underlying felony was necessary to secure Johnson's felony murder conviction**

The People agree with Johnson to the extent that in order to convict Johnson of felony murder, the prosecution had to show that the underlying enumerated felony to support the felony murder charge was committed. The charged enumerated underlying felony was not robbery, however, but larceny; that is, the prosecution had to show that the murder was committed during the perpetration of or the attempt to perpetrate a larceny.

ii) Claim that Judge Callahan found that the newly discovered evidence convincingly discredited the robbery theory that the prosecution relied on at trial to meet the critical enumerated felony requirement of felony murder

The People do not dispute that a reading of the trial court's findings on remand from the Court of Appeals do show that the trial court was of the opinion that the killing of the victim had not been a robbery gone bad (which had been the prosecution's theory at trial) (Motion Transcript, 08/07/15, 14-16).

As can be seen from a reading of this passage, the trial court based its opinion that the murder of Lisa Kindred had not been the result of a robbery gone bad, but instead possibly a murder-for-hire, involving the husband having hired the Defendants, on the Roseville Police reports of domestic abuse. The question, as the People see it, is whether the trial court should have even considered the police reports of domestic abuse at this hearing on remand. Indeed, the People objected to the admission of, and the trial court's consideration of, the police reports on a number of grounds (see Motion Transcript, 04/08/15, 28-30), those being that the admission of, and the trial court's

consideration of, the police reports, were beyond the scope of this Court's Remand Order, that they were hearsay, and that they were not admissible because they were not relevant.

a) The Roseville Police reports of domestic abuse were beyond the scope of the Supreme Court's Remand Order

This case was on remand pursuant to this Court's Order, which stated, in pertinent part:

[W]e REMAND this case to the Court of Appeals for consideration, as on leave granted, of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal;

As can be seen, the claims regarding the victim's son were the subject matter of the remand from this Court. In his initial Application to this Court (Docket No. 147410), Johnson did not even make any claim about evidence of domestic violence, and for good reason. Johnson could not make this claim because Johnson, in a third Motion for Relief from Judgment, filed by the Wisconsin Innocence Project in November of 2009, made the allegation that he had new evidence of ineffective assistance of trial counsel for trial counsel's failure to investigate and present evidence of domestic abuse on the part of Will Kindred against the victim. In an Opinion and Order, dated February 2, 2010, Judge Edwards (Judge Callahan's predecessor) rejected that claim. In his Application to this Court from the denial of his third Motion for Relief from Judgment, Johnson claimed as follows:

Justly Johnson is entitled to a new trial, or at least an evidentiary hearing, based on new evidence of ineffective assistance of counsel.

- A. Trial and appellate counsel performed deficiently.
- I. Trial and appellate counsel performed deficiently by failing to investigate and present evidence pointing to William Kindred as the true perpetrator.
- a. Evidence of William Kindred's history of violence toward the victim

The Court of Appeals denied Johnson's Application for Leave to Appeal the trial court's denial of his third Motion for Relief from Judgment "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(G)(2) (sic) and MCR 6.508(D)," (Court of Appeals No. 298189), and this Court denied Johnson's Application for Leave to Appeal "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." (Supreme Court No. 142526). As can be seen, a claim relating to domestic violence had already been denied in prior proceedings. And its consideration in the instant successive Motion for Relief from Judgment was barred. MCR 6.502(G), and MCR 6.508(D)(2).⁴

⁴ The People are cognizant this argument would not apply to Johnson's co-defendant Kendrick Scott, and that this Court, in its Remand Order, did state, "if [this Court] determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for MCR 6.508(D)(2) . . ." It is the People's position that evidence of domestic violence was also beyond the scope of this Court's Remand Order in Scott.

b) The Roseville Police reports were hearsay

To potentially effect a different result on retrial and thereby satisfy the fourth *Cress* factor, the newly discovered evidence must be admissible. *People v Grissom*, 492 Mich 296, 324; 821 NW2d 50 (2012) (Marilyn Kelly, J. concurring).

Reports prepared by police officers or their affiliates are not admissible under MRE 803(6), the business records exception, or MRE 803(8), the public records exception, because they are adversarial investigatory reports prepared in anticipation of litigation and thus lack the requisite indicia of trustworthiness. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003); *Solomon v Shuell*, 435 Mich 104, 130-133; 457 NW2d 669 (1990).

c) The Roseville Police reports were not relevant

Simply showing a motive for a murder is not enough to make such evidence admissible without there being some nexus between the proffered evidence and the charged crime. See *State v Rabellizsa*, 79 Hawai'i 347; 903 P2d 43, 46-47 (1995), and the cases cited therein.

d) Johnson did not show that the Roseville Police reports could not have been discovered for trial using reasonable diligence, in any event.

As far as the “evidence” of domestic abuse being newly discovered, it was never explained why it could not have been discovered for trial using reasonable diligence. Thus, it did not pass the four factor test of *Cress*, *supra*, which is, that:

- 1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative;
- (3) *the party could not, using reasonable diligence, have discovered and produced the evidence at trial*; and (4) the new evidence makes a different result probable on retrial. (Italics added).

- iii) **Claim that inasmuch as Judge Callahan was convinced that the evidence at the hearing entirely defeated the robbery theory, he (Judge Callahan) plainly abused his discretion in denying Johnson's Motion for Relief from Judgment.**

The People will once again set forth what this Court stated in its Remand Order:

[W]e REMAND this case to the Court of Appeals for consideration, as on leave granted, of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal;

It seems rather clear that the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Johnson or Kendrick Scott, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial. The trial court was not directed by this Court's Remand Order to give an opinion about the type of murder involved or the motive for the murder. Nor does the trial court, in its findings, allude to anything testified to by Charmous Skinner that would have led to the conclusion that this was a murder-for-hire, as opposed to a robbery gone bad.

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012). That is what happened here, as far as the trial court giving its opinion about what the case was about, or what the motive for the murder was. The trial court was simply not directed to

address the motive for the murder, or give an opinion on what type of murder it was. The trial court's musings about what type of murder was involved, or what the motive of the murder was, should be regarded as mere dicta.

Although the trial court did exceed the scope of this Court's Remand Order when it gave its opinion that this was a murder-for-hire, as opposed to a robbery gone bad, the trial court, nevertheless, also did do what it was directed by this Court's Remand Order to do, that is determine whether the testimony of Charmous Skinner either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial. The trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Johnson nor Scott. And the trial court found that Johnson's trial counsel, as well as counsel for Scott, were not ineffective in seeking out Skinner for trial. Thus, the trial court did address, and did arrive at a conclusion, relative to the issues that this Court directed it to do in its Remand Order.

III. Johnson's claims of ineffective assistance of trial and appellate counsel pertaining to the victim's son should fail.

A) This Court's Inquiry

This Court's other inquiries, in its Remand Order of November 21, 2014, were (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; and (2) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues (the newly discovered evidence issue and the ineffective assistance of counsel of trial counsel issue) on direct appeal.

B) The People's Response

In his Affidavit (attached as **People's Appendix A**), the victim's son states that after his mother's death, he shut down and repressed it, and that his family tried to make him talk to a counselor, but he never did talk to any counselor or therapist about his mother's death. He gave like testimony at the evidentiary hearing. If the victim's son would not even talk to a counselor or therapist, there seems little likelihood that he would have been willing to talk to a lawyer.

IV. There is no free standing claim of innocence in Michigan jurisprudence, nor should there be; in any event, Johnson has not shown entitlement to relief under the stringent burden of proof that other states which had recognized such a claim have applied.

A) Johnson's Claim

Johnson's final claim is that this Court should grant him relief under a free standing claim of innocence standard.

B) The People's Response

The first problem is that Johnson did not raise this claim in the Court of Appeals. Thus, that Court was not given the opportunity to consider such a claim. See e.g. *People v Holloway*, 387 Mich 772 (1972) ("an appellant may not raise in this Court an issue not presented to the Court of Appeals.").

In *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), the United States Supreme Court, in the context of federal habeas review, and although not going so far as to conclusively recognize that a cognizable actual innocence claim exists under the federal constitution, stated: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.*, 506 US at 417; 113 S Ct at 869. More recently, the Supreme Court has reaffirmed that no stand alone actual innocence claim has yet been recognized, explaining: "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v Perkins*, – US –, 133 S Ct 1924, 1931; 185 L Ed 2d 1019 (2013). If such a right exists, it seems questionable whether it would apply to Johnson's case

because his case is not, in contrast to *Herrera*, a capital case. See *Wright v Stegall*, 247 Fed App'x 709, 711 (CA 6, 2007). Further, *Herrera* also suggested that, when available, the appropriate avenue for relief on actual innocence grounds rests in an application for executive clemency. *Herrera*, 506 US at 414-417; 113 S Ct at 867-869. Because such avenues are available in Michigan, see Const 1963, art 5; § 14; MCL 791.243, it is not clear that the type of actual innocence claim contemplated in *Herrera* would be properly brought before the courts. Johnson has not shown the existence or applicability of a federal freestanding actual innocence claim in this case.

In any event, assuming that such a right exists in Michigan, “the burden placed upon the applicant to prevail in a freestanding-actual-innocence claim should be a ‘Herculean task’ because, once an applicant ‘has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears[,]’ and ‘in the eyes of the law, [the applicant] does not come before the Court as one who is ‘innocent,’ but . . . as one who has been convicted by due process of law’ ” *Ex parte Harleston*, 431 SW3d 67, 70 (Tex App, 2014), quoting from *Herrera, supra*, 506 US at 399-400; 113 S Ct at 859-860. Thus, when a defendant has been “tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants,” *Herrera, supra*, 506 US at 419; 113 S Ct at 870, it is appropriate to apply an “extraordinarily high” standard of review. *Id.*, 506 US at 426; 113 S Ct at 874 (O'Connor, J., concurring).

A number of states that do recognize a free standing claim of innocence do apply an exceedingly high standard. These states require the defendant to prove by clear and convincing evidence that no reasonable juror could have found the defendant guilty in light of the new evidence. *Ex parte Harleston, supra*; *Engesser v Young*, 856 NW2d 471, 483-484 (SD, 2014); *State v Beach*,

370 Mont 163, 168; 302 P3d 47, 53 (2013); *Harris v Commissioner of Corrections*, 134 Conn 44, 49; 37 A3d 802, 806 (2012); *Montoya v Ulibarri, Warden*, 142 NM 89, 99; 163 P3d 476, 486 (2007); *People v Cole*, 1 Misc 3d 531, 542; 765 NYS 2d 477, 486 (2003).

As the Court observed in *Montoya*, the burden to prevail on a free standing claim of innocence is more rigorous than the standard imposed on a defendant making a motion for new trial on the basis of newly discovered evidence. 142 NM at 99; 163 P3d at 486. This was so, the Court said, because the latter standard, requiring a defendant to only show that the newly discovered evidence would probably change the result if a new trial were granted, did not go far enough to protect the public's interest in the finality of a conviction obtained after a defendant had been afforded all constitutional rights required by law. *Id.*

The People have already argued, and given reasons why, Johnson's newly discovered evidence did not, and does not, warrant a new trial under the *Cress* standard. It seems axiomatic that if his newly discovered evidence does not satisfy this standard, it should not be found to satisfy the more stringent clear and convincing evidence standard.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant Johnson's Application for Leave to Appeal.

Respectfully submitted,

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